

**BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL B**

FILED

IN RE: STEPHEN B. NISWANGER, Respondent
 Arkansas Bar ID#96012
 CPC Docket No. 2010-044

AUG 20 2010

**LESLIE W. STEEN
CLERK**

CONSENT FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by the Arkansas Supreme Court in a referral on January 14, 2010. The information related to the Petition for Rehearing filed by Mr. Niswanger in *Darryl Talley, Sr. v. City of North Little Rock*, Arkansas Supreme Court Case no. 2009-11.

On May 24, 2010, Respondent was served with a formal complaint, supported by information from case number 2009-11. A response was filed. The Respondent and the Acting Executive Director / Deputy Director negotiated a discipline by consent proposal, which was submitted to this Panel.

The referral was made on January 14, 2010. On January 14, 2010, the Procedures Regulating Professional Conduct of Attorneys at Law (2002), Section 5C(1) specifically stated: "The Office of Professional Conduct and the Committee shall accept and treat as a formal complaint any writing signed by a judge of a court of record in this State regardless of whether such signature is verified." The referral made in the notice of January 14, 2010, is from the highest court in the State of Arkansas and the signing is implied in the notice from the Court. As such, the Office of Professional Conduct is mandated, by the word shall, to treat the referral made at that time as a formal complaint.

The notice which referred this matter to the Committee was issued as a result of the Petition for Rehearing filed by Mr. Niswanger in 2009-11. The Opinion to which Mr. Niswanger took exception was delivered by the Supreme Court in an Opinion delivered December 3, 2009. The decision of the Court affirmed the ruling of the Trial Court granting a Judgment notwithstanding the verdict which overturned a jury verdict in favor of Mr. Niswanger's client.

Arkansas Supreme Court Rule 1-5 prohibits an attorney from showing disrespect in any argument, brief, or motion filed or made in the Court containing language showing disrespect for the circuit court. The Court set this Rule out in its Opinion of May 30, 2002, in the matter of *Davenport v. Lee*, 76 S.W.3d 265. The Court stated that not only would they not allow disrespect for the judges sitting in circuit courts, but they would not allow an attorney to show disrespect for the members of the Court.

In the Petition for Rehearing and the supporting brief filed by Mr. Niswanger in the *Talley* matter, the following statements are made:

- (1) ...the Court's Opinion in his matter dated December 3, 2009 (the "Opinion") deviates from the Court's long-held and well-established principles governing the standard of review concerning judgments notwithstanding the verdict. The Court has a duty under the law to view the evidence in the record favorably to Talley, especially with respect to evidence supporting the trial court's jurisdiction. However, instead of following these long-held and well-established rules, the Court made specific and erroneous conclusion of law and fact.
- (2) ...the Opinion erroneously changes the law
- (3) ...the Opinion erroneously divests the circuit courts of jurisdiction to

- (4) ...the Opinion unfairly uses the stop-work order to nullify the jury verdicts while at the same time overlooks or ignores the renewed building permit that the City failed to appeal
- (5) ...the Court made specific and egregious errors of law and fact and appeared to “stretch-out” and affirm the trial court rather than uphold the jury verdicts.
- (6) ...the Opinion appears to have been rendered upon the application of poor legal reasoning....
- (7) ...this act of “stretching-out” to nullify the jury verdicts leaves Talley with the suspicion that something other than justice or the rule of law may have affect the Court’s decision-making.
- (8) ...the Opinion....gets the facts wrong...
- (9) ...In addition, even if the Opinion’s conclusion were a true statement of the law and fact, the Court has a duty to view the evidence and all reasonable inferences therefrom in the light most favorable to Talley. The Court failed to fulfill this duty...
- (10)It was this Court’s duty to review those facts and draw inferences in a way that would uphold the jury verdicts. Yet, the Court failed to do so.”
- (11) ...By ignoring or overlooking this evidence, the Court deviated from the standard of review for judgments notwithstanding the verdict.
- (12)this Opinion deviates from long-standing due process principles under the U.S. and Arkansas Constitutions in such a way as to undermine property rights.
- (13) ..the Court misapplied the law in *Ingram*...

- (14) ...First, the Court erroneously concluded that Talley did not appeal Resolution 70777 because “[he] had in fact already agreed to its terms.”
- (15) ...The Court, however, ignores or overlooks the facts in the record that support the jury’s conclusion that the ordinance was void.
- (16) ...Second, the Court overlooked the evidence in the record showing that Talley’s constitutional rights were violated....
- (17) ...In addition to overlooking or ignoring the facts in the record, the Court distinguishes *Ingram* on an immaterial ground, which is an error of law.
- (18) ...The Court’s characterization of *Ingram* is far too narrow, and it suggests dishonest legal reasoning.
- (19) ...The Court’s characterization of *Ingram* is disingenuous...
- (20) ...In addition, the Court ignores or overlooks the renewed building permit issued on September 21, 2006. This is unfair.
- (21) ...On the one hand, the Court stretches to nullify jury verdicts by ignoring facts and changing the law. On the other hand, the Court overlooks or ignores the renewed building permit that can, standing alone, be used to uphold the jury verdicts.

Certain of these same statements were also included in the conclusion of the brief filed by Mr. Niswanger and are not restated herein.

Mr. Niswanger offered that although no single statement 1 through 21 identified in the complaint taken alone is explicitly disrespectful, when taken in totality, the weight of the statements tends to show disrespect for the Court’s legal reasoning in the opinion in question.

Upon consideration of the formal complaint and attached exhibit materials, the consent proposal, and the Arkansas Rules of Professional Conduct, Panel B of the Arkansas Supreme Court Committee on Professional Conduct finds:

1. That Mr. Niswanger's conduct violated Rule 3.4(c) Mr. Niswanger violated Arkansas Supreme Court Rule 1-5, as that Rule has been interpreted by the Arkansas Supreme Court to include the members of the Supreme Court, when he used language and made statements which were disrespectful to the Court, including suggesting that the Court engaged in dishonest legal reasoning. Rule 3.4(c) requires, in pertinent part, that a lawyer not knowingly disobey an obligation under the rules of a tribunal.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel B, that STEPHEN B. NISWANGER, Arkansas Bar ID# 96012, be, and hereby is, CAUTIONED for his conduct in this matter. Pursuant to Section 18.A of the Procedures, Mr. Niswanger is ordered to pay the costs of this proceeding in the amount of FIFTY DOLLARS (\$50). The costs assessed herein shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional Conduct within thirty (30) days of the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court.

ARKANSAS SUPREME COURT COMMITTEE
ON PROFESSIONAL CONDUCT - PANEL B

By: Steve R. Crane
Steve R. Crane, Chair, Panel B

Date: 8 - 20 - 10